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JAMES R. BROWNING,

SUPREME COURT OF THE UNITED STATES

No. 549

JOHN A. HANNAH, ET AL.,
Appellants,

versus

MARGARET M. LARCHE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana.

BRIEF FOR THE APPELLEES.

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Appellees.

On Appeal from the United States District Court for the Western District of Louisiana.

BRIEF FOR THE APPELLEES.

QUESTION PRESENTED.

The question presented is whether the District Court erred in enjoining the Commission from holding a scheduled hearing under The Civil Rights Act of 1957 (71 Stat. 634, 42 U.S.C. 1975, *et seq.)* where it appeared that (a) these plaintiffs are public officials of the State of Louisiana designated as registrars of voters, who were subpoenaed by the Commission as witnesses in their own behalf at a hearing instigated by unnamed complainants with unknown complaints against plaintiffs, (b) whether the Commission, without congressional authority or presidential directive, could by a declaration of policy deny plaintiffs' requests, in advance of the hearing, for the

names of the persons making such complaints and the nature and contents thereof; (c) the rules of procedure by Congress and by the Commission depriving these plaintiffs of adequate legal representation; and (d) the right of Congress or the Commission to violate under the 14th Amendment the rules of fair play and the traditional forms of fair procedure without explicit action by the nation's law makers even if it is possible that the Constitution presents no inhibition.

CONSTITUTIONAL, STATUTORY AND RULES INVOLVED:

Article I, Sections 2, 4 and 8, of the Constitution of the United States.

Amendments 5, 6, 14, 15, 17 to the Constitution of the United States.

(See appendix.)

The Administrative Procedure Act, 5 U. S. C. 1001, *et seq.**

The Civil Rights Act of 1957, 42 U. S. C. 1975, *et seq.*

(See appellant's Brief p. 3.)

18 United States Code 242.*
42 United States Code 1983.*
Louisiana Revised Statutes 14:134.*
Louisiana Revised Statutes 18:221.*
* (See appendix.)

The Rules of Procedure adopted on July 1, 1958, by the Commission on Civil Rights. (L. p. 55.)

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Resolution adopted March 14, 1959, by the Commission on Civil Rights. (L. p. 14.)

STATEMENT.

The "Statement" contained in appellants' brief is supplemented as follows:

Up until the time that subpoenas were served on the plaintiffs to appear, Mr. Gremillion, counsel for plaintiffs by law, had had no notice whatsoever that these plaintiffs would be subpoenaed and up until the first Court hearing, had not been informed or had no idea of what scope of inquiry was to guide the Commission. L. 142-146.

The commission proposed to conduct a **one-day hearing** during which it was to take testimony from some **fifty-eight witnesses** and as well examine the **voluminous records of** each of the **seventeen registrars** which were subpoenaed. (L. 99, 104, 105.) (Emphasis supplied.)

At oral argument in the District Court, Government counsel indicated that the Commission, on previous occasions, had permitted questioning from those present at its open hearings and conferences (L. 211), but the Commission, by resolution (L. 14) and thereafter, refused to disclose the names of complainants or the information in the complaints, even at the scheduled hearing.

At oral argument in the District Court, Government counsel admitted that the Civil Rights Act is silent as to the authority of the Commission to deny or not to deny to these plaintiffs apprisal, confrontation and cross-examination (L. 211).

The record also contains an exchange of letters in May, 1959, between Mr. W. Wilson White, then Assistant Attorney General in charge of the Department of Justice's Civil Rights Division, and Mr. Gremillion, concerning a request, made by the Department in December, 1958, for permission to inspect the registration records in Webster Parish in connection with an investigation by the Department of alleged violations of laws within the Department's jurisdiction relating to discrimination against voters (Pl. Ex. H and I, L. 151). Mr. Tiffany, who had been sent a copy of Mr. Gremillion's letter to Mr. White, wrote to the former on May 18, 1959, that there is no connection between the Commission and the Department; that they operate under different authorizations of law; and that the Commission "has from its inception been only a fact-finding body * * *." (Pl. Ex. J, L. 155).

The legislative background of the Civil Rights Act of 1957 reflects that Mr. Brownell stated that the position which Mr. White, government counsel in the District Court, fills would be the same as that created by the statute establishing an assistant attorney general who would head up the division on Civil Rights, and also be the chief legal adviser to direct Government's legal activities in the field of Civil Rights. *U. S. Code Congressional and Administrative News*, 1957, volume 2, pages 1973-1979, 2009-2010.

> "The minority report in congress stated it is the understanding of the Commission, predicated upon the testimony of the Attorney General, that the individual authorized to be employed by this sec-

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tion will be so designated and given such responsibility (head of a Civil Rights Division)."

The majority report states that the reason for not specifically stating the title and duties of the newly authorized assistant, is purely one of internal management on the part of the Attorney General as head of the Department of Justice. *U. S. Code Congressional and Administrative News*, 1957, volume 2, pages 1972-1974. Mr. White represented the Commission on the trial of this matter in the lower court.

SUMMARY OF ARGUMENT AND INTRODUCTION.

The Commission on Civil Rights, itself, made and adopted certain rules of procedure which included those which Congress laid down by statute and other rules in addition thereto for the conduct of its hearings.

The District Court enjoined the Commission from conducting a hearing pursuant to these Commission-made rules of procedure whereby these plaintiffs were denied the right of apprisal, confrontation and cross-examination, there being no express or explicit authorization for such a denial.

Under its act, the Commission is to report to Congress findings and recommendations predicated upon its investigations and hearings. This has been done. The Commission's findings and conclusions of law published in this report, in part, state that a substantial number of negroes are being denied their right to vote in Louisiana through discriminatory application and administration of Louisiana registration laws. Plaintiffs, under the State law, are solely responsible and charged with the

administration of their state's registration laws. This adjudication alone concludes that state and federal laws have been violated by one or all of plaintiffs and published to Congress under mandate, to the President, also to the Nation.

I.

Comparison of *Greene v. McElroy*, 360 U. S. 474 with this cause reflects a striking similarity. Plaintiffs aggrieved were gainfully employed and because of their employment were brought into contact with the executive agency which had accusations against them which, if true, would have meant a loss of employment. Plaintiffs were denied the right to apprisal, confrontation and cross-examination which left them helpless to exonerate themselves of accusations. In the cause at bar compulsory process was used against plaintiffs, but was not available for their use and the accusations were informal indictments that plaintiffs had violated both State and Federal criminal statutes.

Greene is the culmination of historical judicial recognition of the traditional procedural safeguards of fair play.

Congress has established a national policy recognizing these safeguards of fair play by enacting the Administrative Procedural Act.

There is no state statute involved herein nor any state's policy in regard to investigations and the traditional procedural safeguards.

There is a serious constitutional question involved inasmuch as plaintiffs' rights to apprisal, confrontation,

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and cross-examination have been denied through executive interpretation of a questionable statute wherein no authority explicit or express can be found for the denial of plaintiffs' rights.

II.

The conduct of Commission's hearings is governed by the Administrative Procedure Act in that, (1) the Commission's statute does not exempt it from the provisions of the Administrative Procedure Act, and (2) the Commission in fact adjudicates at its hearings and in its report to Congress and the President. Its conclusion that plaintiffs have violated the law speaks for itself.

III.

Congress has only the legislative investigatory power to delve into those areas where it may constitutionally legislate.

1. Congress' only power to regulate elections and/or the right to vote are granted to it by Article I, Secs. 2, 4 and 8 and Amendments 14, 15 and 17 to the United States Constitution. The provisions of Article I and Amendment 17 gives to Congress the right to control the "time, place and manner," of federal elections or state primaries nominating party candidates therefor. The investigatory powers of the Commission are not restricted to these constitutional limitations but extend to all elections and to registration which is not within the purview of these provisions. Amendments 14 and 15 are restrictions preventing the denial of the right to vote occasioned by governmental action. Here again, the powers of the Com-

mission to investigate extend far beyond their limited constitutional grant.

2. The act itself creates a Commission of inquiry to investigate specific complaints against individuals accused of crimes. The creation by the legislative branch of an executive commission to perform a judicial function is a most grave departure from the separation of powers doctrine.

3. Conceding for the purpose of argument that the legislative branch of government would have the power to investigate itself the areas it assigned to the Commission, it does not have the power to delegate to the executive branch, the investigatory power which is purely and simply a part of the legislative function. That is investigation for the purpose of determining the necessity and advisability of new laws in certain fields. The assignment of this legislative function to the executive branch is clearly unconstitutional.

ARGUMENT.

I.

The Rules, Regulations and Policies, Under Which the Civil Rights Commission Seek to Hold a Hearing As Concerns Plaintiffs, Are Based Upon No Legal Authority, and Are Unlawful and Unconstitutional As Such Deny Plaintiffs' Rights to a Full, Fair and Impartial Hearing Under the Law with Benefit of the Traditional Procedural Safeguards.

(A) On Defendant's Failure To Inform Plaintiffs of the Scope and Subject Matter of Inquiry.

Plaintiffs have individually in their official capacities as Registrars of Voters received subpoenas which

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command them to appear before defendants at a certain time and place and to:

> ". . . testify what you may know relative to subject matters of inquiry committed by law to the consideration of said Commission." (L. pp. 16-17.)

Plaintiffs, then, refer to the statute to ascertain the scope and subject matter of inquiry:

> "(a) The Commission shall—
>
> "(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based."
>
> 42 U.S.C.A., 1975 (c) (a) (1).

The above purports to advise plaintiffs as to the subject matter of inquiry. Its scope is tainted with the "vice of vagueness".

Watkins v. United States, 354 U. S. 178.

And is so sweeping, uncertain, general and generic, that it could not in any manner inform plaintiffs of the scope and subject matter of inquiry with the degree of explicitness and clarity which is required by law.

Plaintiffs are affected by this executive agency action and jurisprudence clearly demands that defendants shall inform plaintiffs of the matters of fact and

law asserted, thereby establishing and appraising plaintiffs of the scope and subject matter of inquiry.

Jones v. Securities Commission, 298 U. S. 1;
Watkins v. United States, 354 U. S. 178.

In the *Jones* case the Supreme Court announced:

> "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based on specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring or by what it actually succeeds in bringing, to light."
>
> *Jones v. Securities Commission*, 298 U. S. 27.

In the *Watkins* case, Mr. Chief Justice Warren, the organ of the Court, declared upon this issue:

> ". . . It is obvious that a person compelled to make this choice **(to testify or not)** is entitled to have knowledge of the subject to which interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of a criminal offense. . . ."
>
> 354 U. S. 178.
>
> ". . . It is only those investigations that are conducted by use of compulsory process that give rise

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to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide constitutional requisites of fairness for witnesses. . . ."

354 U. S. 178.

Witnesses must be informed with a sound degree of certainty:

"Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech. . . ."

Winters v. New York, 333 U. S. 507.

The Supreme Court has reaffirmed the exactness and degree of certainty demanded in the scope of inquiry and its subject matter which must be afforded a witness.

Scull v. Virginia, May 4, 1959, 359 U. S. 344.

Defendants have in no way, manner, shape or form complied with law by informing plaintiffs of the scope and subject matter of inquiry or the matters of fact and law asserted.

Defendants have likewise failed to inform plaintiffs of what persons will conduct the hearing at issue and have thereby prevented plaintiffs from examining whether or not such persons are legally constituted as a body to conduct said hearing.

In failing to inform plaintiffs as to any specific, certain and explicit subject matter of inquiry, plaintiffs

are unable to prepare themselves for testimony, present rebuttal evidence of any character or to consult counsel thereon in an attempt to protect themselves and/or to be able to testify in the interests of justice.

(B) **On Defendants' Failure and Refusal to Inform Plaintiffs of Their Accusers, Accusations Against Them and Subject Matter Thereof.**

Although plaintiffs have demanded of defendants their right to see the accusations and affidavits filed against them defendants have expressly refused to disclose the names of accusers or other information in the accusations to anyone except members of the Commission and members of the staff assigned to process, study, or investigate such complaints. (L. p. 14, L. p. 150.)

This denial was by resolution and adopted as policy which is far more offensive than the rules and regulations adopted by defendants, yet they have not seen fit to make this denial a part of their rules and regulations. (L. p. 14, L. p. 55.)

Plaintiffs have a basic right to know in advance with what they are charged and the nature of the charges against them.

It has been held and long established that in denying a witness knowledge, information, and full disclosure of the charges or claims under consideration such fails to satisfy the requirement of a full hearing.

Morgan v. United States, 304 U. S. 1.

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"Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

304 U. S. 25.

". . . After an ex parte discussion with them and without according any reasonable opportunity to the respondents to contest therein. That is more than an irregularity in practice, it is a vital defect."

304 U. S. 26.

The *Morgan* case *supra*, has been strongly relied upon in asserting the principle that a full disclosure must be given to a witness before he could be afforded a fair and full hearing.

Greene v. McElroy, No. 180, October Term, 1958, and authorities cited therein.

Without such disclosure plaintiffs are without opportunity to prepare for the giving of testimony or obtain proper legal counsel and/or do justice in giving testimony.

(C) **On Defendants' Failure and Refusal to Afford Plaintiffs' Right to Confrontation and Cross-Examination of Their Accusers.**

Defendants have refused to make any disclosure of the names of accusers or other information in the accusations to plaintiffs and such will deprive plaintiffs

of their rights to confrontation and cross-examination of their accusers, traditional procedural safeguards.

However, should any witness appear before defendants and give testimony or produce evidence against them, plaintiffs are helpless and their rights abridged by virtue of Rule 3 (i) of the Rules and Regulations made and adopted by defendants which reads as follows:

> "3. (1) Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by staff personnel."

This denial is unreasonable, arbitrary and capricious and further unlawful and unconstitutional. Confrontation and cross-examination under oath are protected by the American ideal of due process and despite the fact that plaintiffs are being condemned by faceless accusers some of whom are not even known to defendants, these rights have been denied plaintiffs.

This denial is clearly unwarranted and unjustified.

Our jurisprudence from time immemorial upheld the rights of an accused person at hearings, trials and in courts to be advised of the charges against him, faced and confronted by his accusers, and permitted to cross-examine his accusers.

In *Jones v. Securities Commission*, 298 U. S. 1, 27, 57 S. Ct. 654, 80 L. Ed. 1015, the Supreme Court said:

> ". . . 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commis-

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sion without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.'

"The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. . . .

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. **An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light. . . .**" (Emphasis supplied).

In *Morgan, et al., v. United States, et al.*, 304 U. S. 1, 14, 20, 25, involving an administrative hearing, the Court said:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field

of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' . . .

* * * * * *

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. . . .

> " 'Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. . . '."

In the most recent decision on this subject, handed down by the Supreme Court on June 29, 1959, *Greene v. McElroy*, 360 U. S. 474, and speaking through Chief Justice Warren, the following language is found:

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"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and crossexamination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *e. g.*, *Mattox v. United States*, 156 U. S. 237, 242-244; *Kirby v. United States*, 174 U. S. 47; *Motes v. United States*, 178 U. S. 458, 474; *In re Oliver*, 333 U. S. 257, 273, but also in all types of cases where administrative and regulatory action were under scrutiny. *e. g.*, *Southern R. Co. v. Virginia*, 290 U. S. 190; *Ohio Bell Telephone Co. v. Commission*, 301 U. S. 292; *Morgan v. United States*, 304 U. S. 1, 19; *Carter v. Kubler*, 320 U. S. 243; *Reilly v. Pinkus*, 338 U. S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in

enacting regulatory legislation. *Joint Antifascist Committee v. McGrath*, 341 U. S. 168-169 (concurring opinion).

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> " 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.'

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, *e. g.*, *The Japanese Immigrant Case*, 189 U. S. 86, 101; *Dismuke v. United States*, 297 U. S. 167, 172; *Ex parte Endo*, 323 U. S. 283, 229-300; *American Power Co. v. Securities and Exchange Comm'n*, 329 U. S. 90, 107-108; *Hannegan v. Esquire*, 327 U. S. 146, 156; *Wong Yang, Sung v. McGrath*, 339 U. S. 33, 49. *Cf. Anniston Mfg. Co. v. Davis*, 301 U. S. 337; *United States v. Rumely*, 345 U. S. 41. **These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without**

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the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." (Emphasis supplied.)

And Mr. Justice Douglas, concurring in *Peters v. Hobby*, says:

"It, therefore, becomes necessary for me to reach the constitutional issue.

"Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.

"Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. **We deal here with the reputation of men and their right to work—things more precious than property itself.** We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of em-

ployees in the Government, but also employees who work for private firms having contracts with the Government. . . .

". . . An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting. See the opinion of Mr. Justice Black in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 144-146.

"Those who see the force of this position counter by saying that the Government's sources of information must be protected, if the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty', they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise." (Emphasis supplied.)

Peters v. Hobby, 349 U. S. 351-352.

"It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence. *In re Oliver*, 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682. 'The

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hearing, moreover, must be a real one, not a sham or a pretense.' *Palko v. State of Connecticut*, 302 U. S. 319, 327, 58 S. Ct. 149, 153, 82 L. Ed. 288. Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, *e. g.*, *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027."

"This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. See Switchmen's Union of North America v. National Mediation Board, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61; Tutun v. United States, 270 U. S. 568, 576, 577, 46 S. Ct. 425, 426, 70 L. Ed. 738; Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point * * *.' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, The French Revolution in English History. 'The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' *United States, ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 551, 70 S. Ct. 309, 317, 94 L. Ed. 317 (dissenting). Appearances in the dark are apt to look different in the light of day.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of

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Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 167-174.

See also:

Shaughnessy v. United States, 345 U. S. 206.

In these deeds and acts defendants attempt to conduct an unwholesome and unfair hearing which fails to comport with the traditional ideas of fair procedure.

Certainly plaintiffs could not have benefit of counsel to bring to light all of the facts if confrontation and cross-examination of witnesses is denied.

The *Greene* case can be favorably compared with the case at bar as plaintiffs and Greene are:

1. Both citizens of these United States;
2. Both gainfully employed;
3. Both, because of their employment, brought into con-

test of an executive agency of the federal government whose aim is to control their activities.

4. Both under accusations accepted by a federal agency of the Executive Branch of our Government as creditable and valid;
5. Not assured or provided the traditional procedural Safeguards of apprisal, confrontation and cross-examination;
6. Because of the accepted accusations, subject to loss of their gainful employment;
7. Both are in the judgment of the particular federal executive agency "poor risks";
8. The questions propounded to Greene are in the same category as proposed interrogatories to the plaintiffs.

The difference in this case lies in the harsher penalties suffered by plaintiffs in that:

1. Plaintiffs are under compulsory and involuntary process to give forced testimony, whereas, Greene voluntarily sought the hearing;
2. Plaintiffs' jobs are **not** within the area of national security, whereas Greene's job was;
3. Plaintiffs are subject to criminal and civil prosecution in the federal courts as well as criminal prosecution in the Louisiana courts and would be at a financial loss exonerating themselves. 42 U. S. C. 1983, 18 U. S. C. 242, Louisiana R. S. 14:134, Louisiana R. S. 18:221.
4. Greene was allowed witnesses in their behalf, whereas these plaintiffs are not.

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The celebrated case of *Counselman v. Hitchcock*, 142 U. S. 547, abhors the type of practice attempted here wherein compulsory process is employed.

(D) On Defendants' Failure, Inability and Refusal to Allow Plaintiffs to Present Their Cases Fully Without Restriction.

Under the rules and regulations adopted by defendants, plaintiffs are thoroughly curtailed and wholly restricted in presenting their contentions.

Plaintiffs are without the right of compulsory process and are at the mercy of the arbitrary whim and caprice of defendants.

Under the Commission's statute the members of the Commission have the sole and final discretion and authority to subpoena witnesses.

42 U.S.C.A., 1975 (a);
42 U.S.C.A., 1975 (d).

In being denied the right of compulsory service to summon evidence and witnesses in their behalf plaintiffs cannot present a full and true disclosure of facts.

Should a witness appear in plaintiffs' behalf and be allowed to give testimony, plaintiffs have no right to direct examination of their own witness.

Rule 3 (i) of the Commission's Rule of Procedure prohibits such exercise of this right.

Defendants' denial in this instance clearly prevents plaintiffs' exercise of their right to have adequate representation and consultation of counsel.

(E) On Defendants' Authorities:

Defendants cite *Norwegian Nitrogen Products Company v. United States*, 288 U. S. 294, in support of their position.

Plaintiffs submit that this decision recognizes the traditional procedural safeguards:

> "For still another reason the ruling made by the Commission was not an arbitrary refusal to give the kind of hearing that in the circumstances of this particular inquiry was reasonable and fair." 288 U. S. 323.

In reaching this conclusion this Court found:

1. That petitioner was not subpoenaed to appear at the hearing at all and appeared entirely on its own volition;
2. That petitioner was afforded the opportunity to be apprised of all the facts except certain trade secrets for its refusal to reveal its trade secrets;
3. That petitioner was afforded the opportunity to, and did, cross-examine witnesses.
4. That petitioner was afforded, without restriction, the Commission's compulsory process power to present its case in the fullest extent possible.

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Defendants, in contrast to the above, did not and will not provide any of the procedural safeguards enumerated.

In re Groban, 352 U. S. 330, is clearly distinguishable. Groban had an Ohio statute under focus, it was an emergency for the exercise of that state's police power. This procedure was of long-established legislative policy of the people of Ohio. Although compulsory process was utilized, there were no complaints and accusations as are here present.

Plaintiffs are in contest with the federal executive. Policy of the United States through its people is clearly expressed and recognized as in *Greene* and the decisions prior thereto. The Administrative Procedure Act clearly establishes National policy as to the conduct of executive agencies when a citizen is in contest therewith despite the defendants' contention that they are exempted therefrom.

The district court clearly followed *Greene v. McElroy* as that Court held there has been no express and explicit authorization by the Congress or the President that the traditional procedural safeguards, apprisal, confrontation and cross-examination are denied plaintiffs or that there is any implication whatsoever in the Act itself that Congress intended such a denial in this field which is of doubtful constitutionality, to say the least.

In *Anonymous v. Baker*, 360 U. S. 287, this Honorable Court followed *Groban* in that a New York statute recognizing that state's policy of long standing was upheld. Therein the judiciary itself was conducting the investigation and the facts therein were less impressing

than in *Groban*. There were no accusations, charges or complaints before the Special Term as are here involved.

The *Greene* case was handed down a short time after *Anonymous*.

(F) **Summing-Up.**

Defendants have no authority whatsoever in their attempt to hold a hearing (at which plaintiffs are adverse parties) pursuant to policies, rules and regulations unfounded in law or equity and contrary to express law and our jurisprudence.

Defendants have denied plaintiffs' rights:

1. TO BE ADVISED OF THE SPECIFIC SCOPE OF MATTER AND QUESTION UNDER INQUIRY INSOFAR AS PLAINTIFFS ARE CONCERNED,
2. TO BE ADVISED OF THEIR ACCUSERS AND HAVE ACCESS TO THE ACCUSATIONS AND OTHER EVIDENCE AGAINST THEM,
3. TO BE CONFRONTED BY THEIR ACCUSERS AND CROSS-EXAMINE THEIR ACCUSERS,
4. TO PRESENT THEIR SIDE OF THE CASE EITHER BY DEFENSE OR OTHERWISE,
5. TO FULL REPRESENTATION AND CONSULTATION OF COUNSEL.

In these deeds and acts defendants attempt to hold a hearing and compel plaintiffs to attend and sub-

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ject themselves to rules and regulations which have been deplored by law and our jurisprudence.

II.

Defendants and the Commission Are Amenable and Subject to the Provisions of the Administrative Procedure Act.

From the largest federal agency to the smallest local body no proceeding can justify itself unless it is fair and just to the parties who appear either voluntarily or through compulsory process.

Investigation, hearing, adjudication, are mere labels that do not reach substantive issues, but arrive at conclusions which, in most cases, are more than mere facts. The findings are conclusions in fullest meaning, involving, as in the case at bar, conclusions of law that there have been violations of law on the part of plaintiffs.

To give men rights, but to deny to them the necessary procedure to exercise those rights is, in effect, to give them nothing.

In the federal field of executive agencies, the Administrative Procedure Act was passed by the Congress, at the insistence of the people, who were assured that it would cure the evils of administrative procedure existing therebefore. 5 U. S. C. 1001, *et seq.*

The very first section of the act creating the Commission on civil rights clearly establishes that this Commission is an agency established within the executive department of the government.

42 U.S.C.A. 1975 A

The very first section of the Administrative Procedure Act defines those executive agencies which come within its purview, the exceptions listed in this first section do not in any way include the Commission on civil rights.

5 U.S.C.A. 1011 reads as follows: "No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly." There is nothing in the Commission Act which expressly exempts the Commission from the applicability of the Administrative Procedure Act. The Supreme Court has upheld the applicability of the Administrative Procedure Act to executive agencies unless the statutes creating such agencies expressly exempt them from the Administrative Procedure Act.

Mr. Justice Jackson, the organ of the Court in *United States v. Morton Salt Co.*, 338 U. S. 632.

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrator whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary encroachment on private rights."

Courts must, regardless of their views of the wisdom or policy of this chapter (Administrative Procedure Act) construe the legislation to eliminate, insofar as its text permits, the practices it condemns. *Wong Yang Sung*

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v. McGrath, 339 U. S. 33; see also *Marcello v. Bonds,* 349 U. S. 302.

In vetoing the Walter Logan bill, an attempt by Congress to enact an administrative procedure bill preceding the Administrative Procedure Act, President Roosevelt said:

> "The objective of the bill is professedly the assurance of fairness in administrative proceedings. With that objective there will be universal agreement. The promotion of expeditious, orderly, and sensible procedure in the conduct of public affairs is a problem which commends itself not only to the Congress and the courts but to the executive departments and administrative agencies themselves."
>
> *United States Code Congressional Service, 79 Congress, Second Session, 1946, page 1198.*

The main features of the Walter Logan bill were embodied in our present Administrative Procedure Act. The Attorney General of the United States favorably recommended passage of the present Administrative Procedure Act saying:

> "The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical expression of the government."
>
> *United States Code Congressional Service, 79 Congress, Second Session, 1946, page 1203.*

The procedural safeguards historically recognized in civil proceedings have been judicially recognized by a long line of jurisprudence culminating in the recent case of *Greene v. McElroy*, 180 October term, Supreme Court, (1958).

The Supreme Court has pronounced when the Congress, through solemn expression has sought to deny these traditional procedural safeguards to the public in civil proceedings, that such must be clearly and expressly declared, and as well, if such authority is present in the executive authority for the protection and security of our nation, clear and express mandate from the President himself must be present before these traditional procedural safeguards can be denied the public.

Kent v. Dulles, 357 U. S. 116;
Peters v. Hobby, 349 U. S. 331;
Ex Parte Endo, 323 U. S. 283;
Greene v. McElroy, supra.

Should this Court agree that the Administrative Procedure Act is binding upon the Commission on Civil Rights it is submitted that 5 U.S.C.A. 1004 entitled "Adjudications" and 5 U.S.C.A. 1006 entitled "Hearings" are primarily binding upon the Commission.

Order and Adjudication are defined in the Administrative Procedure Act (5 U.S.C.A. 1001 D) as:

> "Order means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or **declaratory in form) of any agency in any matter** other than rule making by including licens-

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ing. Adjudication means agency process for the formulation of an order." (Emphasis supplied.)

5 U.S.C.A. 1001 D.

The Commission on civil rights through its statutory duties necessarily adjudicates. It submits to the President and to the Congress comprehensive reports of its activities, **findings** and **recommendations.**

42 U.S.C.A. 1975 C.

In making a finding and formulating recommendations the Commission formulates an order, declaratory in form, which is final disposition of the matters which come before it and in so doing it adjudicates.

It "adjudicates" by its rulings upon the admissibility of evidence at its hearings, by its determinations of what is or is not the truth in matters before it, by its determinations on evidence as to whether or not such is defamatory, degrading or incriminating, by its rulings on whether or not requests of parties for witnesses will be granted, by its determination and sole judge of the pertinency of testimony and evidence adduced at its hearings, by judging conduct of counsel and punishing breaches thereof.

The Commission at its hearings and through its other activities weighs information and evidence and thereupon makes a determination of the facts. From the facts as ascertained and found by the Commission a further step is then and there made in that upon such facts recommendations are made. The statute itself, 42 USCA 1975 C, decides that such findings and recommendations will be contained in a **final** and comprehensive report, and

as such it is final disposition of the matters which the Commission has entertained.

Under the law of the State of Louisiana, plaintiffs are, as registrars, solely charged with the administration of that state's registration laws in their respective parishes. Louisiana Revised Statutes 18:1, *et seq.*

In view of the Commission's report that in Louisiana from the investigation and activities of the Commission "a substantial number of negroes are being denied the right to vote . . . through discriminatory application and administration of State registration laws", the Commission in adjudicating, thusly, passes judgment which is as condemning as any decision of any court in the land. Report of the United States Commission on Civil Rights. 1959, pp. 139-140.

Therefore, as the Commission does adjudicate, the hearings which it conducts are subject to the procedures set forth and the provisions of 5 UCSA 1006.

III.

The Act of Congress Creating the Commission on Civil Rights Is Not Appropriate Legislation.

Congress' power to legislate with regard to elections falls primarily within two distinct categories.

First, the affirmative power to regulate the time, place, and manner of holding Federal elections: Article 1, United States Constitution, Secs. 2, 4 and 8.[1] These

[1] U. S. v. Classic, 313 U. S. 299, 316 (1941); Ex Parte Siebold, 100 U. S. 371, 383 (1879); U. S. v. Mosely, 238 U. S. 383 (1915); Ex Parte Yarbrough, 110 U. S. 651, 658 (1884).

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provisions are the basis of legislation effecting individual, as well as, governmental action in all Federal elections and even in primary elections, selecting nominees for Federal office.[2] This embodies the right of choice, which is simply the right of a qualified voter to vote and have his vote counted for the candidate of his choice in a Federal election.[3] Under these constitutional provisions Congress may not legislate as to the qualifications of voters or even the manner in which they are, or may be, registered.[4] The sole area within the scope of these provisions is whether a voter, qualified under State law, and duly registered (if a prerequisite to vote) has been allowed to cast his ballot freely on election day and have his vote for a Federal office honestly counted. Classic, *supra*. The Commission, in its report and investigations[5] delves almost entirely into the question of voter qualification and registration rather than the areas permitted under the applicable provisions of Article I of the United States Constitution. In fact, the recommendations of the commission are solely directed to registration and qualification of prospective voters.[6] Its actions and duties cannot be said to be valid under the provisions of Article I, as interpreted by this Court.

The specific part of the Act of Congress, which authorizes the Commission to hold these hearings, does not limit the scope of the hearing only to deprivation of the right to vote or have that vote counted in a Federal election or a primary to choose the party nominee for a Federal election, but leaves the Commission the right to inves-

[2] U. S. v. Classic, supra.
[3] Newberry v. United States, 256 U. S. 232 (1921).
[4] The Federalist LIX, LI.
[5] Report U. S. Com. on Civil Rights (1959) pp. 19-133; L. pp. 171-187.
[6] Report of U. S. Commission on Civil Rights (1959) pp. 134-145.

tigate any election State, Parish or Municipal.[7] Even the Commission, in issuing its subpoenas to the registrars, did not limit the scope of its investigation to Federal elections.[8] This is even more apparent when one considers the questions submitted to the various registrars to be answered by them. These questions, when asking about the right to vote and have that vote counted, were not restricted to Federal elections or primaries nominating party candidates for Federal offices but, to the contrary, asked about all elections.[9]

Even though the Act of Congress authorizes the Commission to investigate all cases of voting deprivation, whether in a Federal election or State election, such legislation is not authorized by any of the provisions of Article I of the Constitution of the United States.

The second area in which Congress may legislate with regard to elections is granted specifically by the 14th and 15th amendments to the United States Constitution. This area, however, is limited to situations where the invasion of the right to vote is occasioned by governmental action.

> "The single question presented for our consideration is whether § 5507 can be upheld as a valid enactment, for, if not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the 15th Amendment, for it declares a punishment upon anyone

[7] Public Law 85-315, 85th Congress, Sec. 104 (a) 6.
[8] L. pp. 16 and 17.
[9] L. p. 178, questions 138-140.

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who, by means of bribery, prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action 'by the United States or by any state', and does not contemplate wrongful individual acts. It is in this respect similar to the following clauses in the 14th Amendment."

James v. Bowman, 190 U. S. 127 (1903);

See also:

Terry v. Adams, 345 U. S. 461, rehearing denied 345 U. S. 1003 (1953);

Civil Rights Cases, 109 U. S. 2 (1883).

While Congress may have the right to investigate in order to compile facts which may aid in its legislative duty, it does not have the power to investigate matters and conditions in an area in which Congress is forbidden to legislate: [10]

"There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed coextensive with the power to legislate. Without the power to investigate—including, of course, the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.

[10] 1 Cooley, Constitutional Limitations 11 (8th Ed. 1927); Rottschaefer, American Constitutional Law § 63 (1939).

"(3, 4) **But the power to investigate, broad as it may be, is also subject to recognized limitations.** It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. **Nor does it extend to an area in which Congress is forbidden to legislate.** Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here." (Emphasis supplied).

Quinn v. U. S., 349 U. S. 155, 161.

Where Congress does not have the power or authority to investigate, *a fortiori*, it cannot delegate such power to the Commission.

Recently the United States District Court for the Middle District of Georgia decided the case of *U. S. v. Raines*, 172 F. Supp. 552. While the said case did not discuss the section of the Act creating the Civil Rights Commission, it did determine the point raised by petitioners with regard to the constitutionality of another section of the Civil Rights Act.

In discussing the Civil Rights Act of 1957, the Court in its opinion said (172 F. Supp. 557):

"This brings into focus the question which is now presented for determination by this Court. Under Section 1971 as passed in 1957, is the Attorney

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General permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?

". . . The question is, not what the Attorney General has done here, but what Congress has authorized him to do. As was clearly demonstrated in the case of *United States v. Reese, et al.*, 92 U. S. 214, **where a statute is enacted in general terms sufficiently broad to apply to wrongful acts, outside as well as within the constitutional jurisdiction of Congress such a statute cannot be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit.** 'To limit this statute in the manner now asked would be to make a new law, not to enforce an old one.' Ibid. It is well to note that the Supreme Court was there considering one section of the Act of 1870, of which section 1971 (a) was a part.

"Thus, it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it.

"It is clear beyond question, that the Fifteenth Amendment to the Constitution relates 'solely to action by the United States or by any State, and does not contemplate wrongful individual acts.' *James v. Bowman*, 190 U. S. 127. The statute which is here under consideration, as did the one in the above cited cases, 'on its face . . . purports

to be an exercise of the power granted to Congress by the Fifteenth Amendment.' The government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage.' *U. S. v. Harris*, 106 U. S. 629. The power of Congress to legislate at all upon the subject of voting at State elections rests upon the Fifteenth Amendment. Prior to its enactment there was no constitutional guaranty against discrimination on account of race, color or previous condition of servitude. *U. S. v. Reese, et al.*, 92 U. S. 214.

"Thus, it will be seen that, if Section 1971 (c) is constitutional, it is because of the power given congress by the Fifteenth Amendment. As stated, that Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. . . . Thus, for present purposes, it will be assumed that the Fifteenth Amendment authorizes Congress, by appropriate legislation, to prohibit and punish deprivation of voting privileges on account of race or color by any State or by the officers of any State while in the exercise of state given authority. **It does not, however, authorize Congress to prohibit or punish purely individual and private action depriving another of his right to vote on account of his race or color.**" (Emphasis supplied).

The Court then found that the Civil Rights Act of 1957 was directed at individual as well as State action.

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Pages 11-12 of the opinion read in part (172 F. Supp. 558):

"This brings us to the meat of the controversy here: What does Section 1971 (c) seek to do? Is it limited to state action, as previously defined, or is it sufficiently broad to encompass wrongful action by individuals?

"It will be noted at the outset that the section itself includes no limitation as to the persons subject to suit under it. It includes **any person** engaging in or about to engage in a certain type of conduct. By its own terms the section is applicable to any person engaging in the type of action described herein. . . . If any person other than one clothed with state authority can engage in such act or practice, then the section is broad enough to allow suit against him and is not limited to state action. **It will be particularly noted that the section makes no reference to color of law, a phase with which the Congress is very familiar, having used it in other sections of this, as well as other Civil Rights Acts. . . .**

"Now, what is the prescribed act or practice which brings this section into play? It is not any act or practice which would deprive another of his rights under the Fifteenth Amendment. If that were the language, there could be no doubt about its limitation to state action, since a private citizen acting individually cannot deprive another of his rights under the Fifteenth Amendment. . . .

"Here, however, Congress did not so limit the statute. The action prescribed therein is 'any act or

practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section'. . . ." (Emphasis supplied).

In declaring subsection (c) of Section 131 of Part IV of the Act unconstitutional the Court said (pp. 12-22) (172 F. Supp. 561-2):

"Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color. The fact that the instant case is a suit against state officials cannot alter the scope of the statute. This illustrates the danger of this type of legislation, which danger was recognized as early as the case of *United States v. Reese, et al.*, 92 U. S. 214. There the Court held: 'We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. ". . . When

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a person is enjoined from violating a statute, he is entitled to know what that statute prescribes, without awaiting the finality of an authoritative court opinion".'

"As stated in the Reese case, supra: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large.'

"It is this Court's considered opinion that this statute would allow the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. It is the province of the several states to protect the rights of one citizen against the wrongful practices of another person. *James v. Bowman*, 190 U. S. 127. Congress should not be allowed to extend the authority of the Federal Government into this field. . . .

"For the reasons set forth above, the Court concludes that Section 1971 (c) of Title 42 is beyond the jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. . . ."

The Commission may argue that their right to investigate is limited to governmental action, however, the proof of the pudding is in the eating. It has, throughout its report, compiled facts, dealing with denial of the right

to vote, which are related to solely individual action and which are not restricted to Federal elections.[11]

The law is clear that under the separation of powers doctrine the legislative branch of government may not exercise a judicial function.

> "In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.
>
> "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. . . ."
>
> "In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial.

[11] Report of the United States Commission on Civil Rights (1959) pp. 40, 55, 56, 57, 58, 64, 134.

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"The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is not legislative. . . ." *Kilbourn v. Thompson*, 103 U. S. 168, 191, 192 (1881).

As to the nature of the investigation sought to be carried on, the language used by Judge Wisdom in the dissent herein speaks for itself.

"The rub in this case comes from the Act itself. It comes from the incongruity of a legislative commission of inquiry investigating specific complaints against individuals accused of crimes. To my mind, the creation of such a commission is of question-

able legislative propriety, at best. It carries grave danger of legislative usurpation, at worst.

"The investigation of specific violations of the law is for grand juries, not legislative commissions. **With all deference to Congress, a commission, constituted to investigate a broad problem of national interest, has no business holding hearings that must inevitably develop into legislative trials of individuals. . . .**" (L. p. 264.) (Emphasis supplied.)

This investigatory power sought to be exercised by Congress is a bold usurpation of a judicial function and, as such, is unconstitutional.

To date, appellees have limited their argument to the question of the power of Congress to legislate on this matter. Conceding for the purpose of argument only that Congress has the power to legislate and the corollary power to investigate, does it have the power to delegate this purely legislative function to the executive branch of government?

The act creating the Commission makes it mandatory that the Commission report to Congress its findings and recommendations.[12] These recommendations are for new and additional legislation, which Congress, according to the Commission, needs to enact.[13]

This power to investigate the necessity and advisability of new legislation is purely and simply ancillary to the legislative power.

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[12] Pub. Law 85-315, Sec. 104 (b).
[13] L. pp. 134-145.

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"We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this court in the cases we have reviewed are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised." *McGrain v. Daugherty*, 273 U. S. 135, 175 (1927).

The intent of Congress that the Commission is merely filling a function which is theirs is clearly shown by the striking similarity between the rules of House Committees and those of the Commission.[14]

We submit that such attempt of Congress to delegate a purely legislative power to the executive branch of government clearly violates the separation of powers doctrine, so vital to the survival of this nation—even to this Honorable Supreme Court.

IN CONCLUSION.

Congress created the Civil Rights Commission as an executive branch of government.

There are three distinct branches of our Government:

1. Legislative—to make laws
2. Judicial—to interpret laws
3. Executive—to enforce laws

This Commission is not given any law to enforce.

Congress has created manifold executive agencies to enforce laws made by Congress and has given them the power to investigate if such laws are being carried out. Congress is not a law enforcement or a trial agency. Congress, wherever it has the constitutional authority to legislate, has investigatory power to effectuate legislation.

The Civil Rights Commission has made no showing of any constitutional authority in Congress to delegate

[14] Brief of petitioner, L. pp. 61-63.

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its own legislative investigative power to any executive or judicial branch of government; nor can any constitutional authority be shown.

Attention is specifically invited to the fact that while this Commission emphasizes that the rules of the Act creating it are in effect to so-called "Fair Play" rules of the House of Representatives, it also realizes the rules of the House were never adopted by the Senate.

This Commission is acting as an adjudicatory tribunal rather than as a bona fide investigating agency, but refuses to comply with the Administrative Procedure Act. In addition, the proposed hearing at Shreveport did not relate to material matter, since the Commission already had all the information on which to base its report and did make such a report to Congress during the pendency of this appeal.

This appeal is an endeavor to have this Court reverse the District Court and still hold a hearing, simply a fishing expedition with the hope of an exposure just for exposure's sake.

The defendants are without any authority from the Congress or the President to abridge and withhold the traditional procedural safeguards from plaintiffs.

Defendants in an unlawful, imperatorial and autogenous manner attempt to conduct a hearing and control the elicitation of evidence to their own autocratic ends and in so doing prevent plaintiffs from presenting anything in their behalf to affect or change their predetermined conclusion that wrongs and crimes (in the area of suffrage) have been committed by plaintiffs.

Plaintiffs charge and show that defendants are threatening, coercing and in a tyrannical manner bringing unlawful procedures to bear against them causing great injury, not only to them, but as well, to the qualified and franchised voters of this State. If this bold, but unlawful experiment were successful, the civil rights of citizens qualified to vote could be greatly prejudiced by having their vote nullified by persons who might not otherwise be qualified to register and vote, but through these illegal acts have been franchised.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that jurisdiction of the appeal should be noted and that the judgment of the District Court be affirmed.

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PROOF OF SERVICE.

This is to certify that I, Jack P. F. Gremillion, Attorney General, State of Louisiana and a member of the bar of the United States Supreme Court, did, this ..... day of January, 1960 serve copies of the above and foregoing brief on appellants by placing same in the United States Mail, air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

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APPENDIX.

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in

December, unless they shall by Law appoint a different Day.

(Section 8, Paragraph 18)

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

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cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE [XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XVII]

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

U. S. STATUTORY PROVISIONS

18 U. S. C. A. 242

§ 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,

or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

42 U. S. C. A. 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

5 U. S. C. A. 1001 (a)

(a) "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or

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naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by sections 301-303, 304, 305, 306-309, 310, 311-318, 1881-1884 and 1891-1902 of Appendix to Title 50, and sections 1738 and 1744 of Title 12; sections 1611-1614, 1615-1646, and 981-985 of Appendix to Title 50, and sections 101-125 of Title 41; and sections 1738, 1739, and 1743 of Title 12, and sections 1821-1833 of Appendix to Title 50.

5 U. S. C. A. 1004

§ **1004. Adjudications**

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

Notice of hearing and issues

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction

under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the

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performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Declaratory orders

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. June 11, 1946, c. 324 § 5, 60 Stat. 239.

5 U. S. C. A. 1006

§ 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before

boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, pro-

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bative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. June 11, 1946, c. 324, § 7, 60 Stat. 241.

LOUISIANA STATUTORY PROVISIONS

R. S. 14:134

§ 134. Malfeasance in office

Malfeasance in office is committed when any public officer or public employee shall:

(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or

(2) Intentionally perform any such duty in an unlawful manner; or

(3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

R. S. 18:221

§ 221. Violations generally; successive offenses

No person shall violate any provision of this Chapter for which no penalty is specifically provided, or wilfully fail or refuse to perform an act or duty required under this Chapter.

Whoever violates this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned for not less than ninety days nor more than six months. The penalty shall be doubled for the second or any succeeding offense.

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